SHAHARUDDIN ABDUL RAHMAN

v.

SITISAH ISMAIL SDN. BHD.

HIGH COURT MALAYA, IPOH
AJAIB SINGH J
[CIVIL APPEAL NO. 24 OF 1981]
5 APRIL 1982

CIVIL PROCEDURE: *Judgment by default - Defendant absent but counsel present - Judgment by default - Whether justified - Subordinate Courts Rules 1980, O. 28 r. 6(1)a.*

This is an appeal against the decision of the learned Magistrate who had given judgment against the defendant by default for the sum of RM3,904 being advances made to the defendant which the defendant had denied in his defence. On 4 July 1981 when the action was called for hearing the plaintiffs' representative and their Counsel were present. The defendant was absent but his Counsel was present. Thereafter on the oral application of the plaintiffs' Counsel, the learned Magistrate gave judgment in favour of the plaintiffs under O. 28. r. 6(1) (a) of the Subordinate Courts Rules 1980.

Held:

[1] It was wrong for the learned Magistrate to give judgment against the defendant by default. The defendant's Counsel was present and the learned Magistrate was not empowered to invoke r. 6(1) (a) of O. 28 and give judgment by default.

[2] The very form of Summons both under old and new rules states that the defendant is "hereby summoned to appear either in person or by your advocate", and the defendant is allowed to either appear in person or by an advocate and solicitor. Only if both the defendant and his Counsel are absent that a default judgment may be entered against the defendant.

[3] The default judgment against the defendant was bad and irregular and the defendant was therefore entitled to bring his appeal to the High Court without applying to the Magistrate's Court to set aside the judgment.

[4] The appeal is allowed and the case remitted to the learned Magistrate for hearing.

[Appeal allowed. No order as to costs.]

Legislation referred to:
Subordinate Courts Rules 1950, O. XIX r. 2(1)
Subordinate Courts Rules 1980, O.28 r. 6(1)(a)

For the appellant-Paramjit Singh
For the respondent-Lalchand Nathermal

JUDGMENT

Ajaib singh J:

This is an appeal against the decision of the learned Magistrate who had given judgment against the defendant by default. The plaintiffs' claim was for the sum of RM3,904 being advances made to the defendant and the defendant had filed a defence denying the claim. When the action was called on for hearing on 4 July 1981 the plaintiffs' representative was

present together with their Counsel. The defendant was absent but his Counsel was present. Thereafter on the oral application of the plaintiffs' Counsel the learned Magistrate gave judgment in favour of the plaintiffs under O. 28 r. 6(1) (a) of the Subordinate Courts Rules 1980 which reads as follows -

> 6. (1) If, when an action, other than actions to which Orders 43 and 45 apply, is called on for hearing, the plaintiff appears but the defendant does not appears but the defendant does not appear, the Court may:
>
> (a) if the defendant has no counterclaim, on proof of service give judgment for the plaintiff on his claim;

In my view it was wrong for the learned Magistrate to give judgment against the defendant by default. It is true that the defendant himself was absent when the case was called up for hearing but as his counsel was present the learned Magistrate was not empowered to invoke r. 6(1)(a) of O. 28 and give judgment by default. If the learned Magistrate was not inclined to exercise his discretion in favour of granting an adjournment he ought to have proceeded to hear and determine the action in the normal manner which meant that the plaintiffs had to prove their case by adducing sufficient evidence and their witnesses would have been subject to cross-examination by the defendant's Counsel who would also have had the right to call witnesses for the defence and to make a submission to the Court at the end of the hearing. Similarly if the plaintiff is absent but his Counsel is present when an action is called on for hearing the Court cannot just dismiss the action but must allow the plaintiff's Counsel to present his case and call witnesses if he has any in support.

In his grounds of judgment the learned Magistrate referred to r. 2(1) of O. XIX of the old Subordinate Courts Rules 1950 which states that at the trial or hearing of an action any party may appear in person or by solicitor. This particular rule has been omitted from the present Subordinate Courts Rules 1980 and the learned Magistrate apparently thought this omission to be of some significance. It seems to me however that the old r. 2(1) of O. XIX was removed from the new rules as it served no real purpose. It was redundant. But the old and new rules provide for the parties to be represented by Counsel. As for the representation by Counsel for the defendant the very form of summons both under the old and the new rules states that the defendant is "hereby summoned to appear either in person or by your advocate". At the hearing of an action the defendant is thus allowed to either appear in person or by an advocate and solicitor. Only if both the defendant and his Counsel are absent that a default judgment may be entered against the defendant.

The plaintiff or the defendant who stays away when an action is called on for hearing does so at his peril. If his oral testimony is material and important to his case it would be to his great disadvantage if he is absent for if the Court in the exercise of its discretion refuses an adjournment and proceeds to hear the action his Counsel would not be in a position to present his case well. This is a risk which a party takes by not attending Court personally on the date fixed for the hearing of the case but if his Counsel is present then the Court cannot simply throw his case out.

For the reasons which I have set out I would say that the default judgment given against the defendant on July 4 1981 was bad and irregular. The defendant was therefore entitled to bring his appeal to the High Court without first applying to the Magistrate's Court to set aside the judgment. In the circumstances therefore I allow the appeal and order that the case be remitted to the learned Magistrate for hearing. As the learned Magistrate has not heard

the case on its merits he is perfectly entitled now to hear it himself or if he is so inclined to arrange for some other Magistrate to hear it.

There will be no order as to costs.

Also found at [1982] CLJ 261